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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

METRO BOLT AND FASTENER CORP.,
Petitioner,

vs.

WILLIAM and JEAN COATS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

CITATIONS TO OPINIONS BELOW

The opinion of the Tennessee Court of Appeals is unreported, as yet, but is set forth at page 12 of Petitioner's Appendix.

JURISDICTION

The jury verdict of January 10, 1974, was affirmed by the trial court without comment on January 28, 1974. A final order of judgment was entered on January 30, 1974, and plaintiff's motion for a new trial was overruled on April 20, 1974 without opinion. The Tennessee Court of Appeals entered an opinion on June 27, 1975, and the Tennessee Supreme Court denied certiorari on November 17, 1975. This Court granted an extension of time to March 16, 1976, by order dated February 13, 1976. Jurisdiction of the Court is invoked by petitioner under Title 28, Section 1257(3), United States Code.

QUESTIONS PRESENTED

I. Whether or not due process requirements were denied where the plaintiff's case was heard and the trial continued over the holiday season for forty days, when the defendant's case was put in, where the jury requested, during deliberation, the subject matter of the plaintiff's case, the contract exhibit?

II. Whether or not undue prejudice against a foreign corporation is shown where a local jury ignores the admissions of breach of contract by defendant, counter-plaintiff's own testimony and find against the plaintiff and for defendant substantial damages in the face of defendant's admitted breach?

BLEED THROUGH

STATEMENT OF FACTS

This was an action for breach of contract. Metro Bolt and Fastener Corp., a Michigan corporation, filed suit in Chancery in the State of Tennessee, Wilson County Chancery Court, February 16, 1973, alleging that William and Jean Coats breached a contract of employment with the Corporation by refusing and failing to carry out duties under the contract.

By order of April 11, 1973, the Chancery temporarily enjoined defendants from, *inter alia,* directly or indirectly engaging in competitive sales against plaintiff within a specified territory. Defendants denied any breach on their part and counterclaimed alleging that the foreign corporation breached the contract of employment with William Coats and wrongfully terminated his employment.

The local defendants demanded a jury trial, which was granted by the Chancellor. The case was tried for two days in November of 1973 and was recessed by the Court until January of 1974. Trial was completed on January 8, 9 and 10, with the presentation of the defendants' case and counterclaim at that time.

The Chancellor submitted several issues of fact to the jury. The jury found (1) that a contract of employment existed between Metro Bolt Fastener Corporation and William Coats; (2) that no contract of employment existed between Metro Bolt and Fastener Corporation and Jean Coats; (3) that the employment contract between plaintiff and William Coats was breached by plaintiff; (4) that William Coats sustained $27,500.00 in damages as a result of the breach; (5) that William Coats was terminated by plaintiff on or about February 12, 1973, and (6) that William Coats was due $600.00 in salary for all or part of February 1973.

During deliberations the jury requested the subject matter of plaintiff's cause: the contract of employment. This request was denied by the Chancellor.

During the course of the trial, the defendant, William Coats, specifically admitted breaching the contract as charged by the plaintiff (Appendix A, p 11) by not submitting itineraries or work schedules as called for in the contract. The Corporation assigned error to the last two facts. Following entry of the final order of judgment on January 30, 1974, plaintiff timely moved for a new trial which motion was overruled on April 20, 1974.

On June 27, 1975, the Opinion of the Court of Appeals of Tennessee, Middle Section at Nashville was filed. The Court of Appeals took the position that "the Chancellor was correct in refusing the jury's request, to take the contract between the parties into the jury room:

> "Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence." [Appendix B, p. 16]

The court further opined on the second issue that prejudice against the foreign corporation was not evidence since the jury did not give all of the damages that it could have given to the local counterclaimant. (Appendix B, p. 15).

The Corporation then timely sought a petition for writ of certiorari in the Supreme Court of Tennessee at Nashville, the previously stated issues being raised by assignments of error. On November 17, 1975, an order denying the petition was filed.

ARGUMENT

I.

REFUSAL OF THE JURY'S REQUEST TO SEE A CONTRACT EXHIBIT IN A CONTRACT CASE WHERE FORTY DAYS HAS INTERVENED FROM PLAINTIFF'S CASE TO DELIBERATIONS IS TO DENY THE PLAINTIFF (CROSS-DEFENDANT) A FAIR HEARING AND CONSEQUENTLY DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION.

It was found by the Tennessee Court of Appeals that a rule exists in Tennessee that trial exhibits are not to be taken into the jury room during deliberations on the basis that the exhibits would tend to outweigh other evidence and therefore tend to be prejudicial (Appendix B, p. 16); *Shappley v. Graves*, 9 Tenn. App. 567 (1929); *Sinard v. Harris*, 2 Tenn. Civ. App. 486 (1911).

In the instant case the delay of the trial over the holiday season for a period of forty (40) days tended to cause the jury to forget the corporation's proofs including the contract, hence the jury's request for the contract itself. To deny the request was virtually to deny the corporation its right to have its proofs before the jury during deliberations. This turns a rule designed to safeguard against undue influence into a rule which is by itself an engine of oppression.

The reason for this common law rule is reviewed in *Higgins v. Los Angeles Gas & E. Co.*, (Cal.) 115 P. 313 (1911) where it is stated:

> "The only express provision of the law bearing upon the right of juries to use exhibits, or upon the right of the court to permit juries to use exhibits,

in their deliberations is found in §612 of the Code of Civil Procedure, and this has to do solely with "papers" which have been introduced in evidence. One curious in such matters can learn from the common law why this section of the Code was adopted, and why also it is confined to papers. The common-law rule was that jurors were allowed to take with them in their deliberations only such instruments as were under seal, and that they were not permitted to take with them any unsealed papers excepting by consent of the parties. The reason for this, according to Lord Hale and Lord Gilbert, was that jurors were supposed to be, and for the most part were, unlettered men. They could not read. A writing conveyed to them nothing. But in the case of sealed instruments, as these jurors were drawn from the vicinage, they were quite apt to be familiar with the armorial bearings of their neighborhood great from which the seals were derived. An instrument under seal, therefore, spoke for itself, and the jurors were permitted to take such instruments with them, not for the purpose of reading the instrument itself, but rather for the purpose of veryfying their recollection of the seal, and testing its genuineness. The curious inquirer will also find that it was not uncommmon for one who had not arisen to the dignity of possessing an armorial bearing, to set the stamp of his teeth as his seal upon the instrument, and hence the old time phrase of 'proving it to (by) his teeth.' But in the case of other exhibits not involving a knowledge of reading or writing, it seems to have been a matter of discretion with the court to allow the jury to take them into the jury room in aid of their deliberations. This rule, as to

> papers, however, was in force at a time when learning in letters was so rare, and the premium upon such learning so high that a felon could save his neck by proving his ability to read a verse of Scripture. It was to save the possibility of the question arising in this state as in 1812 it arose in the state of Pennsylvania (Alexander v. Jameson, 5 Binn. 238), that the section of the Code was adopted."

The effect of this ancient but hard and fast rule was to deprive the Corporation of due process with respect to its case in chief as well as its defense to the counterclaim, by preventing the jury from examining the very document in the English language and put in question by the trial itself. States have been given great leeway in control over civil procedure, unless,

> "such procedure . . . work(s) a denial of fundamental rights or conflict(s) with specific and applicable provisions of the Federal Constitution, . . . " .
> *Brown v. New Jersey,* 175 US 172, 175 (1899).

It is contended by petitioner that the denial of examination of evidence under the circumstances of delay in this case is equivalent to a denial of the right to put in evidence before the trier of fact, a fundamental to a fair trial, *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970).

II.

UNDUE PREJUDICE AGAINST A FOREIGN CORPORATE PLAINTIFF IS SHOWN WHERE A LOCAL DEFENDANT ADMITS A BREACH OF CONTRACT AND THE JURY NEVERTHELESS AND WITHOUT THE SUPPORT OF EVIDENCE FINDS FOR THE DEFENDANT ON A COUNTERCLAIM AND AGAINST THE CORPORATE PLAINTIFF ON ITS ORGINAL CLAIM.

The trial court in this cause affirmed a judgment against the corporation in spite of admissions indicating that the defendant as alleged had breached the contract himself.

The corporation contends that the equal protection clause of the Fourteenth Amendment is available to a foreign corporation, *Santa Clara County v. Southern Pacific R. Co.*, 118 US 394, 396 (1886), although there appears to be a current trend in the Court's decisions to restrict this right to real persons and in historical terms of racial equality, as under the removal statutes which rest upon the same foundation as the Fourteenth Amendment itself; *State of Georgia v. Rachel*, 384 US 780, 792 (1966).

Assuming the right of the corporation to insist on equal protection, it is asserted that a confirmed verdict which ignores the evidence is a state action proscribed by the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES E. WELLS
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24901 Northwestern Highway
Southfield, Michigan 48075
Telephone: (313) 355-5643
Counsel for Petitioner

Dated: March 2, 1976.

APPENDIX A

TRANSCRIPT OF TRIAL

(767) Q. From $1,200.00 to $1,400.00 a month?

A. At one time. I was supposed to have gotten . . .

Q. Did you complain about that increase?

A. I was supposed to have gotten it started in November. I complained . . . did I complain about the increase once I got it?

Q. Did you complain about him giving you a raise?

A. No.

Q. Now, on February 11, 1973, did you have a telephone conversation with Mr. Bunting?

A. He called me, yes.

Q. And during that telephone conversation did he ask you about an itinerary?

A. I believe he did.

Q. Did he ask you why you were not furnishing him with itineraries?

A. I don't recall.

Q. You don't recall that?

A. No, sir.

Q. Well, was that sort of a constant thing that he kept after you about, where were you, were (sic) are you going, give me an itinerary so I can . . .

A. Only at the last after . . . he began to talk about this at the very end—not up until then.

• • • • •

APPENDIX B

OPINION

(Court of Appeals—Nashville, Tennessee)
(Filed June 27, 1975)

Metro Bolt and Fastener Corporation Plaintiff-Appellant, vs. William Coats and wife, Jean Coats Defendants-Appellees.	Wilson Equity

This is an action for breach of contract. Metro Bolt and Fastener Corporation filed suit in the Chancery Court for Wilson County on February 16, 1973, alleging that William Coats and Jean Coats breached a contract of employment with the Corporation by refusing and failing to carry out duties under the contract. It sought damages and injunctive relief. By Order of April 11, 1973, the Chancellor temporary enjoined defendants from, *inter alia,* directly or indirectly engaging in competitive sales against plaintiff within a specified territory.[1]

Defendants denied any breach on their part and counterclaimed,[2] alleging that the Corporation breached the contract of employment with William Coats and wrongfully terminated his employment. Defendants demanded a jury trial, which was granted by the Chancellor. The case was tried for two days in November of 1973 and, by agreement of the parties, was recessed until January of 1974. The trial was completed on January 8, 9, and 10.

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[1] The record fails to reflect that plaintiff made the proper injunction bond or that the temporary injunction ever issued.

[2] The counter-claim was designated a cross-claim by the parties.

BLEED THROUGH

The Chancellor submitted several issues of fact to the jury. The jury found (1) that a contract of employment existed between Metro Bolt and Fastener Corporation and William Coats, (2) that no contract of employment existed between Metro Bolt and Fastener and Jean Coats, (3) that the employment contract between plaintiff and William Coats was breached by plaintiff, (4) that William Coats sustained $27,500.00 in damages as a result of the breach, (5) that William Coats was terminated by plaintiff on or about February 12, 1973, and (6) that William Coats was due $600 in salary for all or part of February, 1973.

Before the entry of the final decree, plaintiff filed a motion alleging that the issues were improper for consideration and determination by the jury and asking the Chancellor to treat the verdict as advisory. The motion was overruled on January 28, 1974, at which time the Chancellor held that the issues submitted were proper issues for the jury to pass upon and affirmed its findings. The final order of judgment was entered on January 30, 1974. Plaintiff's subsequent motion for a new trial was overruled on April 20, 1974, after which plaintiff prayed for, was granted, and perfected this appeal.

Appellant contends that the Chancellor erred in submitting the cause to a jury.[3] It is argued that there is no right to a jury trial in Chancery Court and that appellees' jury demand should have been denied or the verdict treated as advisory only.

Prior to the filing of this action, the statute granting the privilege of a jury trial in equity cases in Chancery

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[3] In the same assignment of error a second complaint was also raised, but it was not called to the Chancellor's attention in appellant's motion for a new trial. Consequently we are precluded from considering it. *Cohen* v. *Cook*, 62 Tenn. App. 292, 462 S.W.2d 502 (1969); Court of Appeals Rule 12(5).

Court was repealed. Tenn. Pub. Acts 1972, Ch. 565. No constitutional or common law right to a jury exists in such cases. *Marler* v. *Wear,* 117 Tenn. 244, 96 S.W. 447 (1906); *Neely* v. *State,* 63 Tenn. 174 (1874).

A complaint seeking damages for breach of contract is, however, an action at law. Parties have a right to demand a jury when legal relief has been sought, even if the case is to be tried in Chancery Court, under its concurrent jurisdiction over certain civil causes. *Ashe* v. *State ex rel. Shriver,* 518 S.W.2d 360 (Tenn. 1975). This is true even when the request for legal relief is coupled with an application for an equitable remedy from the Chancellor.

It is further contended that the verdict is "contrary to the law and the evidence and that the court erred in allowing the jury verdict to stand and in giving the Cross-Complaint damages in the amount of $28,100.00 against the Cross-Defendant." It is well settled that an assignment that a verdict is contrary to the law and evidence is insufficient to raise any issue for determination on appeal from a jury verdict that has been approved by the trial judge. *Netherly* v. *Hornbuckle,* 484 S.W.2d 542 (Tenn. App. 1972). The reason is that in a jury case this Court may not weigh the evidence but may only determine if there is any material evidence to support the verdict. *Morgan* v. *Dillard,* 61 Tenn. App. 519, 456 S.W.2d 359 (1970). An examination of this record discloses material evidence to support the conclusions reached by the jury.

Appellant argues that the verdict of the jury demonstrates passion, caprice, and prejudice and is not supported by the evidence. We find that the amount of damages awarded by the jury is within the range of verdict which a reasonable and impartial jury could have returned and thus does not support an inference of an improper state

BLEED THROUGH

of mind by the jurors. The evidence shows that the contract of employment between appellant and William Coats was for an initial period of three years and that 24½ months of that term remained at the date of the breach. At that time Coats was earning $1,400.00 per month salary and had previously earned commissions averaging approximately $100.00 per month. Appellee was entitled to recover damages for the whole term of the contract. *Jeffers* v. *Stanley,* 486 S.W.2d 737 (Tenn. 1972). Since the jury verdict of $27,500.00 was an award of $1,122.45 per month and is less than Coats would have earned under the contract it does not appear on its face to evince passion, prejudice, or caprice in favor of Coats. Appellant contends, however, that the jury failed to consider what Coats might have earned after the date of trial. Under our cases, the burden is on the employer to establish that by the exercise of due diligence the discharged employee could mitigate his damages. *Jeffers* v. *Stanley, supra.* The record shows that trial counsel for appellant did not cross-examine either William Coats or Jean Coats as to other employment or earnings. When counsel for Mr. Coats attempted to inquire into his financial condition and earnings, trial counsel for appellant objected. The jury may have found that appellant did not carry its burden of persuasion on the matter of mitigation of damages. It is clear, however, that the jury awarded appellee some $9,000.00 less than the full amount he was likely to earn under the contract.

It is said that the Chancellor erred in allowing counsel for the defendant to "repeatedly use leading and improper questions." Specific examples of such questions have not been called to this Court's attention in appellant's assignment or brief and this portion of the assignment thus does not meet the requirements of specificity contained in our Rules. Court of Appeals Rule 12. Cf. *Stacker* v. *L. & N. R. Co.,* 106 Tenn. 450, 61 S.W. 766 (1901).

Appellant contends that the Chancellor erred in refusing to allow the jury to take the contract between the parties into the jury room as requested by the jurors. The Chancellor was correct in refusing the jury's request. Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence. *Shappley* v. *Graves,* 9 Tenn. App. 567 (1929); *Sinard* v. *Harris,* 2 Tenn. Civ. App. 486 (1911). There was no agreement by the parties stipulating that the jury could take the contract into its deliberations.

Appellant argues that the Chancellor erred in rejecting the following special charge:

> That if defendant and cross-complainant is entitled to recover the balance due on his salary, it would be an amount less any amount earned or ought by reasonable diligence to have been earned, in any other employment.

It is further argued that it was error to give the following charge requested by appellee:

> I charge your gentlemen of the jury, that if you find that Metro Bolt and Fastener Corporation breached its contract of employment with the Defendant, William Coats, that the proper measure of damages for breach of contract of employment is the salary contracted for, less any payments and less any amount that was in the exercise of reasonable diligence, should have been earned by the said William Coats during the contract term, that is, I charge you that the proper measure of damages would be the salary agreed upon by the parties for the remaining term of this contract, less any payment made by the said Metro Bolt and Fastener Corporation or any salary that was earned by

BLEED THROUGH

> the said William Coats or should have been earned, in the exercise of ordinary and reasonable diligence. I further charge you gentlemen of the jury, that the burden would be upon Metro Bolt and Fastener Corporation in this action for breach of contract of employment to establish any matters that would mitigate damages to be recovered by Mr. Coats, such as earnings or other payments that he may have or should have received by the exercise of reasonable diligence during the remaining term of this contract. If you find that the said Metro Bolt and Fastener Corporation has not established any mitigation of damages as above charged you by the Court, then it will be your duty to award the full amount of salary agreed upon by the parties for the remaining term of this contract.

The charge given by the Chancellor was an accurate statement of the law and we find no error. See *Jeffers* v. *Stanley, supra.* The substance of appellant's special request was charged by the Chancellor and we find no error in its denial.

Finally, appellant claims that the trial court erred in "allowing the jury to completely disregard the uncontradicted proof that the defendant was supposed to train salesmen and failed to do so and thereby breached his contract." We see no merit in this assignment. The testimony of William Coats supports the jury's conclusion that Coats did not breach the contract in the manner alleged by appellant.

The Chancellor is affirmed. Costs of this appeal are taxed to appellant.

Affirmed.

/s/ Frank F. Drowota, III, Judge

Shriver, P.J., concurs.
Todd, J., concurs.

APPENDIX C

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(Supreme Court of Tennessee at Nashville)

Metro Bolt and Fastener Corporation,
Petitioner,
vs.
William Coats and Jean Coats,
Respondents.
} Wilson Eqiuty

(Filed November 17, 1975)

After consideration of the petition for writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Appeals reached the correct results.

The writ is accordingly denied at the cost of the petitioners.

PER CURIAM

IN THE

APR 15 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1257

METRO BOLT AND FASTENER CORPORATION,

Petitioner,

v.

WILLIAM COATS and JEAN COATS,

Respondents.

BRIEF OF RESPONDENTS, WILLIAM COATS AND JEAN COATS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1327

METRO BOLT AND FASTENER CORPORATION,
Petitioner,

v.

WILLIAM AND JEAN COATS,
Respondents.

BRIEF OF RESPONDENTS, WILLIAMS COATS AND JEAN COATS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondents, William Coats and Jean Coats submit (1) that Petitioner raises no substantial federal question, (2) that even if it be assumed *arguendo* that a substantial federal question has now been raised, Petitioners failed to timely and with fair precision raise that question for consideration by either the Court of Appeals of the State of Tennessee or the Supreme Court of the State of Tennessee, and (3) that regardless of the foregoing, the State Court decision now sought to be reviewed rests firmly

upon State grounds wholly independent of the "federal question" now raised. The Clerk of this Court granted Respondents an extension of time within which to file this opposing brief to May 4, 1976, by Order dated March 29, 1976. Under the circumstances, it is our feeling that this Honorable Court lacks jurisdiction to grant review by certiorari in this cause.

STATEMENT OF FACTS

The Petitioner's Statement of Facts contained on Page 3 of their Petition for Writ of Certiorari are substantially correct except that the statement ". . . was recessed by the Court until January of 1974. Trial was completed on January 8, 9 and 10 with presentation of Defendant's case and counterclaim at that time," is not entirely correct. The case was tried two days in November, being November 29 and 30, 1973, at which time the case was recessed by the Court, by agreement of the parties, until January 8, 1974. (Appendix B, p. 16) Petitioner presented evidence on November 29 and 30, 1973, and January 8, 1974. Defendant presented evidence on January 8 and 9, 1974. Petitioner presented rebuttal proof on January 9 and the case was submitted to the jury on January 10, 1974.

We cannot fully accept the Statement of Facts contained on Page 4 of the Petitioner's Petition.

ADDITIONAL STATEMENT OF FACTS

We deem it necessary to supplement the Statement of Facts as follows:

The Defendant, William Coats, did not admit breaching the contract as alleged and, in fact, the Court of Appeals

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held "the testimony of William Coats supports the jury's conclusion that William Coats (Respondent herein) did not breach the contract in the manner alleged by Appellant." (Appendix B, p. 21)

During the deliberations of the jury, the jury asked if they might take the contract into the jury room during their deliberations. The Chancellor ruled that, since both parties did not consent for the jury to take the contract into the jury room, the request was denied.

During the course of the trial, it was testified to by Metro Bolt and Fastener Corporation (Petitioner herein), through its president and secretary, and by William Coats (Respondent herein) that several changes had been made by oral agreements between the parties to the terms of the written contract, including the monthly salary, which was raised from $1,200.00 to $1,400.00 per month (Appendix A, p. 15) and also that the duties of the Defendant, William Coats, were increased and modified. These changes amounted to substantial changes of the written contract.

The Petitioner, Metro Bolt and Fastener Corporation, filed a Motion for New Trial which was overruled on April 20, 1974. Said Motion for New Trial did not contain any ground alleging that the recess from November 30, 1973, to January 8, 1974, had in anywise prejudiced their case or deprived them of due process. They only alleged that the Court erred in refusing to allow the jury to take the contract into the jury room. (T.R. 104-109)

Petitioner's Assignment of Errors to both the Tennessee Court of Appeals and the Tennessee Supreme Court did not contain any Assignment of Error alleging that the recess of said cause during the holidays violated any fed-

eral right guaranteed them under the United States Constitution, but alleged that this violated Plaintiff's right guaranteed to him under the Constitution of the State of Tennessee, Article I, Section 17.

Petitioner's Assignment of Errors to both the Court of Appeals of Tennessee and the Supreme Court of Tennessee relative to the jury not being permitted to carry the contract into the jury room during deliberations, did not in anywise mention or claim a "federal question" or a federal right had in anywise been violated, but charged that Plaintiff's rights had been violated under the Constitution of the State of Tennessee, Article I, Section 17. At no place in this record, either in the Appeal and Assignment of Errors to the Court of Appeals of the State of Tennessee or in the Petition for Certiorari to the Supreme Court of the State of Tennessee, did Petitioner, Metro Bolt and Fastener Corporation, in anywise allege or claim any violation of any rights under the Federal Constitution or ask the State Courts to pass on any "federal question."

We, therefore, submit that Petitioner's allegation in their Statement of Facts that "the previously stated issues were raised in the Assignment of Errors" is not substantiated by the record.

The Court of Appeals of Tennessee held that the recess from November 30, 1973, to January 8, 1974, was by agreement of the parties. (Appendix B, p. 16)

The Court of Appeals decreed that the Chancellor was correct in refusing the jury's request to take the contract between the parties into the jury room as follows:

> "Our cases do not permit the jury to take Exhibits to the jury room during deliberations on the ground they are likely to be given undue weight as compared with

BLEED THROUGH

other evidence. Shappley v. Graves, 9 Tenn. App. 567 (1929); Sinard v. Harris, 2 Tenn. Civ. App. 486 (1911). There was no agreement by the parties stipulating that the jury could take the contract into its deliberations." (Appendix B, p. 20)

The Supreme Court of Tennessee denied certiorari on November 17, 1974. (Appendix C, p. 22) The judgment of the Court was entered with a joint judgment against Metro Bolt and Fastener Corporation, Principal, and Insurance Company of North America, Surety. (Appendix D, p. 23)

No stay of execution or notice of appeal was ever filed by Metro Bolt and Fastener Corporation in the office of the Supreme Court Clerk of Tennessee and the judgment and costs were paid in full on February 6, 1976, by the surety, who has not joined in this appeal.

ARGUMENT

I.

PETITIONERS RAISE NO SUBSTANTIAL FEDERAL QUESTION.

Without specifying the precise basis therefor, Petitioners state that:

"Jurisdiction of this Court to entertain the Petition of Certiorari is based on Title 28, 1257 (3), United States Code."

Petitioners put forth the argument that the recess over the holidays tended to cause the jury to forget the Plaintiff's proof, including the contract. Petitioner has alleged that this, in effect, denied the Petitioner his right to have

his proof before the jury. This recess was by agreement of both parties (Appendix B, p. 16); and, hence, Petitioner is estopped from attempting to claim his rights were affected by the recess.

The Petitioner has insinuated that the jury never saw the contract from the date it was initially read, filed as an exhibit and passed to the jury. Petitioner introduced proof on November 29 and 30, 1973, and January 8, 1974. In addition to this, Plaintiff introduced rebuttal proof on January 9, 1974. On January 8, 1974, in the initial presentation of Defendant's proof, this contract was again read in its entirety to the jury. (Appendix A, p. 15) The record shows that the contract was referred to in questioning witnesses throughout the trial in establishing the oral changes made by the parties to the written instrument. The contract was passed to the jury and examined by them in open court.

The Rule of Tennessee Law applicable to taking exhibits into the jury room during deliberations has long been established as follows:

> "Exhibits are not permitted to be taken by the jury to the jury room during deliberations except by agreement of the parties stipulating that the jury can take the exhibits into the jury room. Shapley v. Graves, 9 Tenn. App. 567 (1929); Sinard v. Harris, 2 Tenn. Civ. App. 486 (1911)."

In this instant case, the Tennessee Court of Appeals simply reiterated this rule of law as follows:

> "Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence. Shapley v. Graves, 9 Tenn. App.

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567 (1929); Sinard v. Harris, 2 Tenn. Civ. App. 486 (1911). There was no agreement by the parties stipulating that the jury could take the contract into its deliberations." (Appendix B, p. 20)

Under Tennessee Law, a jury in a Chancery Court sits only in an advisory capacity. Before the entry of Final Decree, Petitioner filed a Motion alleging that the issues were improper for consideration and determination by the jury and asking the Chancellor to treat the verdict as advisory. The Motion was overruled and the Chancellor held that the issues submitted were proper issues for the jury to pass upon and affirmed its findings. (Appendix B, p. 17)

The contract had been changed by subsequent oral agreements between the parties, including the salary paid to Mr. Coats, as well as other changes. (Appendix A, p. 15) In the instant case where the written contract was changed by oral agreements, presents a factual situation clearly falling within the reasoning of the Tennessee Rule prohibiting the written exhibits to be taken into the jury room without the consent of all parties. The reason for this rule under Tennessee Law is stated in the case of *Sinard v. Harris*, 2 Tenn. Civ. App. 486 (1911), on Page 496, as follows:

"To permit such course would be, as many courts point out and as noted by the authorities already cited, to permit undue advantage on behalf of the party who has introduced the writing so taken. As pointed out by our Supreme Court, in the excerpt of Crisman v. McMuray, heretofore set out, it is natural that the jury would give to such writings taken out with it 'more probative force than their recollection' of what had been said orally as said in a note found on Page

> 478 of Abbots Civil Trial Briefs, the reason for withholding such writings from the jury where part of the evidence has been oral is 'that the testimony which they contain if read and reread by the jury would otherwise have an unfair advantage over the oral testimony by speaking to the jury more than once.'"

This Rule applies equally to all parties and simply insures that all parties are given a fair and equal hearing.

This Court has frequently held the construction of State Laws is the exclusive responsibility of State Courts. *Speiser v. Randall*, 78 S. Ct. 1332, 357 U.S. 513, 2 L. Ed. 2d 1460, and

> "We are asked to go into the proper construction of the state statute and its validity under the State Constitution. But these are questions of local law, the decision of which by the Supreme Court of the State is controlling." *First National Bank of Garnett v. Ayers*, 16 S. Ct. 412, 160 U.S. 660, 664, 40 L. Ed. 573.

and

> "The question whether or not a state statute conflicts with the constitution of the State is settled by the decision of its highest Court." *Carstairs v. Cochran*, 24 S. Ct. 318, 193 U.S. 10, 16, 48 L. Ed. 596.

The rule of law involved in the instant case involves a "local rule" of law which has been long established by Appellate Court decisions of Tennessee.

PETITIONER'S FAILURE TO RAISE AND PRESERVE THE "FEDERAL QUESTION"

The rules of the Supreme Court of the United States and, in particular, Rule 23(f) thereof, expressly dictate

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that when review of a State Court Judgment is sought the Petition for Certiorari must specify, *inter alia*,

> "(1) The stage in the proceedings in the Court of first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed were raised; (2) the method of raising (the federal question sought to be reviewed), (e.g. by a pleading, by request to charge, and exceptions, by assignment of error) and (3) the way in which (the federal question sought to be reviewed) were passed upon by the lower (court)."

Rule 23(f) of the Supreme Court of the United States further requires that the foregoing matters be set out in such form

> ". . . as will show the federal question was timely and properly raised so to give the Court the jurisdiction to review the judgment on writ of certiorari."

Compliance with the above quoted portions of Rule 23(f) is clearly jurisdictional and must be complied with. *Wilson v. Cook*, 327 U.S. 474, 90 L. Ed. 793, 799.

As this Court will recognize the instant petition for writ of certiorari makes no showing whatsoever that the "federal question" now urged was at any stage presented to or considered by either the Tennessee Court of Appeals or the Supreme Court of the State of Tennessee in determining this cause, as required by the rules of this Court, before the Court will consider same for review.

Petitioner filed a Motion for New Trial before the Trial Court, which was overruled on April 20, 1974. Said Motion did not contain any ground alleging that the recess had in anywise prejudiced their case or deprived them of due process in anywise under the United States Constitution.

Thereafter, Petitioner prayed and perfected an appeal to the Tennessee Court of Appeals. Nowhere in their assignments of error was there any suggestion or charge that the recess of said cause during the holidays violated any federal right guaranteed to them under the United States Constitution and, likewise, did not allege or charge that the Chancellor's refusal to permit the jury to carry the contract into the jury room during their deliberations violated any federal right guaranteed to them under the Constitution of the United States but alleged that Petitioner's rights had been violated under the Constitution of the State of Tennessee, Article I, Section 17.

The Court of Appeals of the State of Tennessee passed upon these questions pursuant to the laws of the State of Tennessee and the Constitution of the State of Tennessee, as no suggestion or request at any stage was made by Petitioner asking the Court of Appeals of the State of Tennessee to pass upon these questions under the Constitution of the United States. There was no mention by the Court of Appeals' Opinion of any federal question being presented or passed on. (Appendix B, pp. 16-21)

The judgment of the lower court was affirmed by the Court of Appeals, in which the Court of Appeals held that the recess of said trial over the holidays was by agreement of the parties (Appendix B, p. 16) and that the Chancellor was correct in not permitting the jury to take the contract into the jury room (Appendix B, p. 20), all of which were interpreted and passed on pursuant to Tennessee Law under the Constitution of Tennessee.

Thereafter, Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee. At no place in their Assignment of Errors was a violation of any federal right mentioned or claimed, nor was this

rule of Tennessee Law drawn as a "federal question" to be interpreted under the Constitution of the United States. The Assignment of Errors contained in the Petition for Certiorari to the Supreme Court of Tennessee again simply alleged that same violated Petitioner's rights as guaranteed under Article I, Section 17, of the Constitution of the State of Tennessee. At no point in this record did the Petitioner ever allege, nor was the Court of Appeals of Tennessee or the Supreme Court of Tennessee ever asked to pass upon any "federal question" under the Constitution of the United States and, hence, we submit to this Honorable Court that the Petitioner has failed to timely raise any claim of any violation of any rights under the Constitution of the United States. As noted in *Durley v. Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 1183:

> "It is well established principle of this Court that before we will review a decision of the State Court, it must affirmatively appear from the record that the federal question was presented to the highest Court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of this cause." (Citations omitted)

The proposition thus stated is discussed at length in numerous decisions compiled in an annotation found at 84 L. Ed. 926, and annotation updated in 100 L. Ed. 1200, it being unequivocally stated in the later that:

> "Thus the more recent decisions provide ample support for the proposition that review by the Supreme Court of a State decision requires that it be shown (1) that the State Court actually decided a federal question and (2) that decision of the Federal Court was necessary to the State Court's determination of the cause (there being no adequate state ground on which the State Court's judgment could have rested)."

In the case of *Bowe v. Scott*, 34 S. Ct. 769, this Court said on Page 771 as follows:

> "The other passage in the bill is found in subdivision 'C' of the 10th paragraph, and is as follows: 'That the ordinance is an attempt to take from your Complainants whose property adjoins and abuts upon said alley their rights in and to said alley without due process of law.' But it is settled that such an averment making no reference to the constitution of the United States and asserting no express rights thereunder, is solely referable to the State Constitution which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this Court." (Citations omitted)

As shown by the opinion of the Court of Appeals of the State of Tennessee in this case (Appendix B, pp. 16-21), and the opinion of the Supreme Court of Tennessee denying certiorari (Appendix C, p. 22), does not in anywise indicate or show that they were ever called upon to pass upon any "federal question" in this case and, consequently, we submit that no federal question was ever raised in this case prior to the time that Petitioner filed his application for certiorari to the Supreme Court of the United States.

II.

In response to the second question raised by Petitioner as to undue prejudice, we aver that this issue is wholly without foundation in this record. Petitioner did not claim a violation of any rights under the Constitution of the United States at any time before the State Courts. However, as shown in the Opinion of the Court of Appeals, the Court of Appeals held that the verdict was well within reasonable limits and did not evince passion, prejudice or caprice in favor of Coats. (Appendix B, p. 18)

The Court further held that the testimony supported the jury's conclusion that Coats did not breach the contract in the manner alleged by Appellant. (Appendix B, p. 21)

All of these issues were matters of proof which the jury resolved in favor of Defendants, and which verdict was approved by the Trial Judge, affirmed by the Court of Appeals and Certiorari denied by the Supreme Court.

THE TRUE GROUND OF DECISION

The State Court decision sought to be reviewed here clearly rests firmly upon State Law grounds. The argument advanced by the Petitioner alleging that the recess prejudiced his rights in this case is not tenable as the record clearly shows that this was done by agreement of the parties. There certainly can be no federal question involved in a recess of the Court which recess was based upon an agreement of both parties. The other question raised being the proposition of local Tennessee Law which prohibits the jury taking exhibits into the jury room without the consent of both parties. This being the common-law rule and clearly grounded in Tennessee Law as a Rule of Procedure and supported by Court decisions of the Appellate Courts of said State. This rule is applied equally to both parties and, consequently, affords equal protection to each party under the law. The record before this Court affirmatively shows that the "federal question" now urged was not even presented for consideration to the State Courts. It necessarily follows that a decision of the federal question was not necessary to the State Court's determination of this cause. We feel that the true grounds upon which this case was decided rested entirely upon the facts showing that Metro Bolt and Fastener Corporation breached the contract by wrongfully

firing or terminating Defendant William Coats' employment on or about February 12, 1973. (Appendix B, p. 17) This ground is wholly independent of any federal question and was a factual issue resolved by the jury, approved by the Trial Court, with a concurring opinion of the Court of Appeals and the opinion of the Supreme Court of Tennessee denying Certiorari.

CONCLUSION

In summary, Respondents submit that Petitioner does not, in fact, pose a substantial federal question for review and that, even if the contrary be assumed, *arguendo*, the "federal question" now raised was neither presented to nor considered by the Appellate Courts of the State of Tennessee. In the final analysis, the decision sought to be reviewed was determined solely upon State Law grounds and is in no fashion turned upon a determination of the "federal question." For the various reasons set forth herein, Respondents, William Coats and Jean Coats, respectfully submit that this Court lacks jurisdiction to review the State Court decision here involved and should forthwith deny this Petition for Writ of Certiorari.

Respectfully submitted,

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AGEE & BOND
Of Counsel

APPENDIX A

TRANSCRIPT OF TRIAL

* * *

DIRECT TESTIMONY OF VIRGINIA BUNTING:
(B.E. 176)

Q Would you state your name for the record, please, ma'am?

A Virginia Bunting.

Q And I believe you are the wife of Harold Bunting, who testified previously, are you not?

A Yes, sir.

Q And are you an officer with the corporation of Metro Bolt and Fastener Corporation?

A Yes, sir.

(B.E. 177)

Q And what position do you hold?

A Secretary-Treasurer.

* * *

(B.E. 227)

Q What was he paid per month while he was with the company?

A He was paid $600.00 on the 15th and $600.00 on the 1st up until January of 1973 when he received a salary increase of $700.00 on the first and $700.00 on the fifteenth.

* * *

DIRECT TESTIMONY OF WILLIAM COATS:
(B.E. 545)

COURT: Well, he has a right to read the contract.

(Mr. Agee read complete Contract at this time aloud to the jury.)

Q Now, when you entered into this contract with Mr. Bunting and he purchased your company, have I read what your duties were to be with this company?

A Yes, sir.

Q Now, who was to be this District Manager under this contract?

A It was me.

* * *

APPENDIX B

OPINION

(Court of Appeals—Nashville, Tennessee)
(Filed June 27, 1975)

Metro Bolt and Fastener Corporation
Plaintiff-Appellant,

vs.

William Coats and wife, Jean Coats
Defendants-Appellees.

} Wilson Equity

This is an action for breach of contract. Metro Bolt and Fastener Corporation filed suit in the Chancery Court for Wilson County on February 16, 1973, alleging that William Coats and Jean Coats breached a contract of employment with the Corporation by refusing and failing to carry out duties under the contract. It sought damages and injunctive relief. By Order of April 11, 1973, the Chancellor temporary enjoined defendants from, *inter alia*, directly or indirectly engaging in competitive sales against plaintiff within a specified territory.[1]

Defendants denied any breach on their part and counter-claimed,[2] alleging that the Corporation breached the contract of employment with William Coats and wrongfully terminated his employment. Defendants demanded a jury trial, which was granted by the Chancellor. The case was tried for two days in November of 1973 and, by agreement of the parties, was recessed until January of 1974. The trial was completed on January 8, 9, and 10.

[1]The record fails to reflect that plaintiff made the proper injunction bond or that the temporary injunction ever issued.

[2]The counter-claim was designated a cross-claim by the parties.

The Chancellor submitted several issues of fact to the jury. The jury found (1) that a contract of employment existed between Metro Bolt and Fastener Corporation and William Coats, (2) that no contract of employment existed between Metro Bolt and Fastener and Jean Coats, (3) that the employment contract between plaintiff and William Coats was breached by plaintiff, (4) that William Coats sustained $27,500.00 in damages as a result of the breach, (5) that William Coats was terminated by plaintiff on or about February 12, 1973, and (6) that William Coats was due $600 in salary for all or part of February, 1973.

Before the entry of the final decree, plaintiff filed a motion alleging that the issues were improper for consideration and determination by the jury and asking the Chancellor to treat the verdict as advisory. The motion was overruled on January 28, 1974, at which time the Chancellor held that the issues submitted were proper issues for the jury to pass upon and affirmed its findings. The final order of judgment was entered on January 30, 1974. Plaintiff's subsequent motion for a new trial was overruled on April 20, 1974, after which plaintiff prayed for, was granted, and perfected this appeal.

Appellant contends that the Chancellor erred in submitting the cause to a jury.[3] It is argued that there is no right to a jury trial in Chancery Court and that appellees' jury demand should have been denied or the verdict treated as advisory only.

Prior to the filing of this action, the statute granting the privilege of a jury trial in equity cases in Chancery

[3]In the same assignment of error a second complaint was also raised, but it was not called to the Chancellor's attention in appellant's motion for a new trial. Consequently we are precluded from considering it. **Cohen v. Cook**, 62 Tenn. App. 292, 462 S. W. 2d 502 (1969); Court of Appeals Rule 12(5).

Court was repealed. Tenn. Pub. Acts 1972, Ch. 565. No constitutional or common law right to a jury exists in such cases. *Marler v. Wear*, 117 Tenn. 244, 96 S.W. 447 (1906); *Neely v. State*, 63 Tenn. 174 (1874).

A complaint seeking damages for breach of contract is, however, an action at law. Parties have a right to demand a jury when legal relief has been sought, even if the case is to be tried in Chancery Court, under its concurrent jurisdiction over certain civil causes. *Ashe v. State ex rel, Shriver*, 518 S.W.2d 360 (Tenn. 1975). This is true even when the request for legal relief is coupled with an application for an equitable remedy from the Chancellor.

It is further contended that the verdict is "contrary to the law and the evidence and that the court erred in allowing the jury verdict to stand and in giving the Cross-Complaint damages in the amount of $28,100.00 against the Cross-Defendant." It is well settled that an assignment that a verdict is contrary to the law and evidence is insufficient to raise any issue for determination on appeal from a jury verdict that has been approved by the trial judge. *Netherly v. Hornbuckle*, 484 S.W.2d 542 (Tenn. App. 1972). The reason is that in a jury case this Court may not weigh the evidence but may only determine if there is any material evidence to support the verdict. *Morgan v. Dillard*, 61 Tenn. App. 519, 456 S.W.2d 359 (1970). An examination of this record discloses material evidence to support the conclusions reached by the jury.

Appellant argues that the verdict of the jury demonstrates passion, caprice, and prejudice and is not supported by the evidence. We find that the amount of damages awarded by the jury is within the range of verdict which a reasonable and impartial jury could have returned and thus does not support an inference of an improper state

of mind by the jurors. The evidence shows that the contract of employment between appellant and William Coats was for an initial period of three years and that 24-1/2 months of that term remained at the date of the breach. At that time Coats was earning $1,400.00 per month salary and had previously earned commissions averaging approximately $100.00 per month. Appellee was entitled to recover damages for the whole term of the contract. *Jeffers v. Stanley*, 486 S.W.2d 737 (Tenn. 1972). Since the jury verdict of $27,500.00 was an award of $1,122.45 per month and is less than Coats would have earned under the contract it does not appear on its face to evince passion, prejudice, or caprice in favor of Coats. Appellant contends, however, that the jury failed to consider what Coats might have earned after the date of trial. Under our cases, the burden is on the employer to establish that by the exercise of due diligence the discharged employee could mitigate his damages. *Jeffers v. Stanley, supra*. The record shows that trial counsel for appellant did not cross-examine either William Coats or Jean Coats as to other employment or earnings. When counsel for Mr. Coats attempted to inquire into his financial condition and earnings, trial counsel for appellant objected. The jury may have found that appellant did not carry its burden of persuasion on the matter of mitigation of damages. It is clear, however, that the jury awarded appellee some $9,000.00 less than the full amount he was likely to earn under the contract.

It is said that the Chancellor erred in allowing counsel for the defendant to "repeatedly use leading and improper questions." Specific examples of such questions have not been called to this Court's attention in appellant's assignment or brief and this portion of the assignment thus does not meet the requirements of specificity contained in our Rules. Court of Appeals Rule 12. Cf. *Stacker v. L. & N. R. Co.*, 106 Tenn. 450, 61 S.W. 766 (1901).

Appellant contends that the Chancellor erred in refusing to allow the jury to take the contract between the parties into the jury room as requested by the jurors. The Chancellor was correct in refusing the jury's request. Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence. *Shappley v. Graves*, 9 Tenn. App. 567 (1929); *Sinard v. Harris*, 2 Tenn. Civ. App. 486 (1911). There was no agreement by the parties stipulating that the jury could take the contract into its deliberations.

Appellant argues that the Chancellor erred in rejecting the following special charge:

> That if defendant and cross-complainant is entitled to recover the balance due on his salary, it would be an amount less any amount earned or ought by reasonable diligence to have been earned, in any other employment.

It is further argued that it was error to give the following charge requested by appellee:

> I charge your gentlemen of the jury, that if you find that Metro Bolt and Fastener Corporation breached its contract of employment with the Defendant, William Coats, that the proper measure of damages for breach of contract of employment is the salary contracted for, less any payments and less any amount that was in the exercise of reasonable diligence, should have been earned by the said William Coats during the contract term, that is, I charge you that the proper measure of damages would be the salary agreed upon by the parties for the remaining term of this contract, less any payment made by the said Metro Bolt and Fastener Corporation or any salary that was earned by

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the said William Coats or should have been earned, in the exercise of ordinary and reasonable diligence. I further charge you gentlemen of the jury, that the burden would be upon Metro Bolt and Fastener Corporation in this action for breach of contract of employment to establish any matters that would mitigate damages to be recovered by Mr. Coats, such as earnings or other payments that he may have or should have received by the exercise of reasonable diligence during the remaining term of this contract. If you find that the said Metro Bolt and Fastener Corporation has not established any mitigation of damages as above charged you by the Court, then it will be your duty to award the full amount of salary agreed upon by the parties for the remaining term of this contract.

The charge given by the Chancellor was an accurate statement of the law and we find no error. See *Jeffers v. Stanley, supra*. The substance of appellant's special request was charged by the Chancellor and we find no error in its denial.

Finally, appellant claims that the trial court erred in "allowing the jury to completely disregard the uncontradicted proof that the defendant was supposed to train salesmen and failed to do so and thereby breached his contract." We see no merit in this assignment. The testimony of William Coats supports the jury's conclusion that Coats did not breach the contract in the manner alleged by appellant.

The Chancellor is affirmed. Costs of this appeal are taxed to appellant.

Affirmed.

/s/ Frank F. Drowota, III, Judge

Shriver, P.J., concurs.
Todd, J., concurs.

APPENDIX C

ORDER DENYING MOTION FOR WRIT OF CERTIORARI

(Supreme Court of Tennessee at Nashville)

Metro Bolt and Fastener Corporation,
Petitioner,

vs.

William Coats and Jean Coats,
Respondents.

} Wilson Equity

(Filed November 17, 1975)

After consideration of the petition for writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Appeals reached the correct results.

The writ is accordingly denied at the cost of the petitioners.

PER CURIAM

APPENDIX D

COURT OF APPEALS, NASHVILLE

METRO BOLT AND FASTENER CORPORATION, Appellant	
Vs.	Wilson Equity
WILLIAM COATS, AND WIFE, JEAN COATS, Appellees	Affirmed

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Wilson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree of the Chancellor be affirmed and that the original complaint be dismissed and the cross-bill sustained, and the cross-complainant, William Coats, have and recover of Metro Bolt and Fastener Corporation, Principal, and Insurance Company of North America, Surety, the sum of $28,100.00, with interest thereon from January 30, 1974, to this date, being $2,369.64: in all, the sum of $30,469.64, and the costs of the Court below; for all of which, let execution issue.

The costs of the appeal will be paid by Metro Bolt and Fastener Corporation, Principal, and Insurance Company of North America, Surety, for which let execution issue. 6/27/75.

c/c 11-26-75